Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	)	GN Docket No. 04-54

COMMENTS OF VERIZON ON THE FOURTH NOTICE OF INQUIRY

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May 10, 2004

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Introduction and Summary

The Commission took an important first step towards ensuring the deployment of advanced telecommunications capability to all Americans in its *Triennial Review Order* by declining to require telephone companies to offer many next-generation broadband facilities and equipment as unbundled network elements. Relying on this decision, Verizon has aggressively expanded its deployment of and reduced the prices for DSL, introduced new service offerings, and begun an aggressive program to deploy next-generation fiber networks, with the goal of passing one million homes by the end of 2004 and offering customers new and innovative bundles of voice, video and data services.

The Commission has made less progress, however, towards lifting the asymmetric regulation of broadband provided by telephone companies. These companies, unlike their intermodal broadband competitors, must offer broadband services on a common-carrier basis pursuant to Title II of the Communications Act and are subject to the Commission's *Computer II/III* requirements. Given the robust intermodal competition in the broadband marketplace, there is no need and no justification for continuing to subject telephone companies to expensive regulations that none of their competitors must contend with.

I. Since the Commission's last section 706 inquiry, competition in broadband has flourished: 80% to 90% of Americans have access to cable modem or DSL service, and competition from fixed and mobile wireless platforms, satellite operators, and electric utilities (delivering broadband over power lines) is increasing with every passing day. Traditional interexchange carriers like AT&T continue to dominate the larger business market, while cable

[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc. identified in the list attached as Exhibit C hereto.

companies continue to dominate the mass market. Local telephone companies are relative newcomers to broadband and lack market power in any broadband market or market segment. Recent studies show cable modem to be leading DSL in service to small businesses as well as residential customers. (Part I, *infra*.)

II. As noted above, the Commission's decision not to require unbundling of many aspects of next-generation networks for mass-market customers is a welcome step towards removing regulatory disincentives to building these all new networks. In order to complete the job that it has started, and to ensure that its *Triennial Review Order* has the desired pro-investment effects, the Commission should clarify three aspects of that order.

Specifically, the Commission should:

- forbear from applying any unbundling requirements for broadband network elements that section 271 might be construed to impose (Part II.A, *infra*);
- clarify the cutoff between mass market and enterprise market for purposes of rules governing unbundling of fiber loops (Part II.B, *infra*); and
- clarify that fiber to a multi-unit premises counts as fiber to the home for purposes of the Commission's unbundling rules, regardless of whether the fiber extends all the way to each unit in the premises (Part II.C, *infra*).

III. The Commission can and should act quickly and decisively to level the regulatory playing field for telephone companies and their intermodal broadband competitors, regardless of the outcome of the *Brand X Internet Services v. FCC* appeals. Various provisions of federal law, including the First Amendment, prohibit the Commission from saddling telephone companies with regulatory burdens that none of their competitors must bear. (Part III.A, *infra*.)

Accordingly, the Commission should reach the same three key decisions regarding telephone-company broadband that it has already reached for cable modem service:

First, the Commission should clarify that broadband providers are free to offer transmission on a private-carriage, rather than a common-carriage, basis. Although the court in *Brand X Internet Services v. FCC* found that cable modem service offered to end users includes a telecommunications service, the court expressly left untouched the Commission's finding, in its *Cable Modem Declaratory Ruling* that cable companies may offer transmission to ISPs on a private-carriage basis. (Part III.B.1, *infra.*)

Second, the Commission should waive the *Computer II/III* rules for broadband and should forbear from imposing the Title II common-carrier requirements that might otherwise apply. *Brand X* does not restrict the Commission's authority to decline to impose common-carrier regulations that are unnecessary and counterproductive. (Part III.B.2, *infra.*)

Third, the Commission should declare broadband Internet access delivered to end users to be an information service and not a telecommunications service. Although the *Brand X* court found that cable modem service delivered to end users includes a telecommunication service, the court did not even consider the FCC's explanation for its statutory classification. Instead, the court regarded itself to be bound by its own prior decision in *AT&T v. City of Portland*, but the court's classification of cable modem service in that case was plainly influenced by the way telephone-company DSL was being regulated (*i.e.*, with the telecommunications underlying the information service being offered on a common-carrier basis). By changing the regulatory classification of broadband services offered by telephone companies, the Commission would improve the chances of obtaining favorable review of the Ninth Circuit's *Brand X* decision, for at least two reasons: (1) The Commission would eliminate the regulatory disparity that tempted the courts to impose common-carrier rules on cable modem service in the first place. (2) The Commission could argue that competition in the broadband marketplace makes common-carrier

regulation of cable unnecessary. Courts have consistently accepted this rationale for declining to impose common-carrier obligations on carriers in the past, but the Commission could not make this highly persuasive argument in defense of its cable modem classification while it continued to impose common-carrier regulations on the telephone companies that are minority players in the broadband market. (Part III.B.3, *infra.*)

IV. As it removes regulatory disincentives to broadband deployment at the federal level, the Commission also should pre-empt state and local attempts to regulate broadband services. This includes indirect attempts at regulation, such as by allocating costs from regulated services to broadband or interfering with carriers' access to needed rights of way. Otherwise, state and local authorities may undermine the Commission's efforts to create a minimal regulatory environment that will encourage broadband deployment. (Part IV, *infra.*)

V. We conclude with a couple of administrative matters. The Commission should adopt a definition of broadband that does not exclude data services provided via new technologies that may be accessible at speeds lower than 200 kbps in each direction. It should also refrain from imposing burdensome new data collection requirements on broadband carriers. (Part V, *infra.*)

By ending the disparate regulatory treatment of broadband provided by telephone companies, and by clarifying the circumstances in which next-generation networks must be unbundled, the Commission will build on its landmark *Triennial Review Order* and allow market forces to drive the deployment of broadband to all Americans, in fulfillment of its obligations under section 706.

Discussion

I. The Broadband Mass Market Is Increasingly Diverse and Competitive

Competition in the broadband mass market (including not only residences but also small and medium-sized businesses) is robust and increasing. Although cable companies continue to dominate the market, they face continued competition not only from DSL provided by telephone companies but also from new intermodal competitors using satellite, fixed and mobile wireless, and broadband-over-power-line platforms. Furthermore, the arrival of next-generation broadband networks, including the deployment of fiber to the premises, promises to make new services and new bundles of services available to an increasing number of Americans. Despite the persistence of a discriminatory regulatory regime in which telephone companies alone among broadband providers face Title II regulation for their services, telephone companies continue to provide the main competitive counterweight to cable companies in current-generation broadband competition, and they provide the greatest hope for bringing competition to cable in its core video market with the advent of next-generation broadband networks.

A. Current-Generation Broadband Is Available Widely and Competitively to Mass Market Customers

As Verizon documented in a recent report,[2] competition in the deployment of broadband facilities and the provision of broadband services is vigorous. Cable companies continue to have a dominant position in the broadband mass market. But cable and telephone companies alike are feeling increased competition from other intermodal competitors. The result of this healthy competition has been rapid deployment of broadband infrastructure nationwide. In addition,

[2] *Broadband Competition: Recent Developments, March 2004*, attachment to *ex parte* letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 01-337, 01-338, 02-33, and 02-52 (FCC filed Mar. 26, 2004), also attached hereto as Exhibit A ("*Broadband Competition Update*").

thanks largely to head-to-head competition between cable modem and DSL services, more bandwidth is available to more Americans at lower cost then ever before.

1. Cable Modem and DSL Compete Head-to-Head Nationwide

According to the National Cable and Telecommunication Association, "cable's advanced digital services are available to more than 90 million homes, or 85 percent of U.S. households." Point Topic, a London broadband research company, recently reported that broadband is available to 89% of all U.S. households.[3] Another study estimated that as of year-end 2003, more than 80% of U.S. households would have access to either DSL or cable modem service, and no more than 5% of U.S. households would be able to receive DSL but not cable modem.[4]

Verizon has invested hundreds of millions of dollars since the beginning of 2003 to increase the availability of its DSL services. By the end of 2003, Verizon had added more than 10 million new DSL-qualified lines, reduced prices by 30% to $34.95 per month (or $29.95 when bundled with phone service), and increased the speed of its basic DSL offering (doubling the download speed from 768 kbps to 1.5 Mbps).[5] This year, Verizon plans to continue expanding DSL availability, with the goal of adding seven million new lines by the end of 2004.[6]

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[3] *See* S. Rosenbush, *et al.*, *Broadband: What's the Holdup?*, Business Week (Mar. 1, 2004), available at http://www.businessweek.com/magazine/content/04_09/b3872049.htm.

[4] *See* J. Bazinet, *et al.*, JP Morgan, Industry Update: *Broadband 2003: Deflation and Market Shares Shift*, at Figure 9 (Dec. 5, 2002). The actual number of households with access to DSL but not cable may well be even lower today, since the study in question assumed that cable modem service would be available to only 76% of U.S. households by year-end 2003, while (as noted above), the actual total today is 85% or higher.

[5] *See* Declaration of Jerome Holland ¶¶ 3-4, *Petitions for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338 (FCC filed Mar. 29, 2004) ("Holland Decl.") (attached hereto as Exhibit B).

[6] *See* Exh. B, Holland Decl. ¶ 3.

Verizon also plans to add a new, additional tier of consumer DSL service with a maximum connection speed of 3Mbps/768Kbps for qualified customers.[7]

These DSL price cuts and service enhancements confirm that competition is real and is putting broadband in the reach of an increasing number of Americans.[8] Cable operators have responded with promotional and targeted price reductions and by increasing data speeds (which effectively lowers the price of bandwidth).[9]

Competition for small and medium-sized businesses is on the rise, just as for residential customers.[10] Both a March 2004 study commissioned by the Small Business Administration ("SBA") and a December 2003 study by In-Stat/MDR found that that cable modem service is now the *most used* broadband technology by small businesses. The SBA study analyzed three different small business segments (those with 0-4 employees, those with 5-9 employees, and those with revenues less than $200,000) and found that "for all three segments penetration was higher for cable modem service than for DSL."[11] The In-Stat/MDR study analyzed home offices as well as businesses with 5 to 99 employees and found that, as of year-end 2003, there were 2.1 million small businesses using cable modems compared to 1.4 million small businesses using DSL.[12] The Yankee Group recently suggested that, among businesses with 20 to 99 employees,

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[7] *See* Verizon Press Release, *Verizon to Expand DSL Offerings With New, Higher-Speed Service and Voice-Over-IP Package* (May 4, 2004).
[8] *See* Exh. A, *Broadband Competition Update* at 2.
[9] *See, e.g.*, Exh B, Holland Decl. ¶ 5; Merrill Lynch, *3Q03 Broadband Update* at 2 (Nov. 3, 2003) (cable operators "are increasingly moving 'off the rate card,' with market-specific pricing and increased use of promotional and bundled-price discounts specific to certain markets").
[10] *See* Exh. A, *Broadband Competition Update* at 3-4.
[11] *Id.* at 4.
[12] *See* K. Burney, In-Stat/MDR, *The Data Nation: Wireline Data Services Spending and Broadband Usage in the U.S. Business Market; Part Three: Small Businesses (5 to 99 Employees)* (Dec. 2003) ("*In-Stat/MDR Small Business Study*").

DSL leads cable by less than 6 percentage points, and cable is gaining share.[13] The Yankee Group also found that, with respect to businesses with fewer than 10 employees, "cable modem and DSL maintained an equal share" of the market and that "cable operators have been extremely successful in serving businesses with 10 people or less."[14] A November 2003 study by In-Stat/MDR indicated that businesses with fewer than 5 employees subscribe to cable modem service more than twice as often as they subscribe to DSL.[15] In short, intermodal competition is reaching small and medium-sized businesses. (Larger business customers or "enterprise" customers demand more sophisticated broadband services, like ATM or Frame Relay – a set of services dominated by the traditional interexchange carriers, like AT&T, and characterized by fierce competition. Traditional local telephone companies, like Verizon, have only a small share, and no market power, in the larger business market.[16])

Nor have schools and libraries been left behind. As the Commission noted in its *Fourth Notice of Inquiry*, in 2002, 94% of public schools reported using broadband connections for Internet access, up from 85% just one year earlier.[17]

2. Intermodal Competition Is on the Rise, Giving More Consumers More Broadband Choices Than Ever Before

Beyond the market-leading cable modem operators and their telephone-company competitors, a number of other broadband providers have entered, or are poised to enter, the

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[13] Yankee Group, *Cable and DSL Battle for Broadband Dominance* at 4-5 (Feb. 2004).
[14] *Id.* at 6.
[15] *See* K. Burney & C. Nelson, In-Stat/MDR, *The Business Hot Wire!: Data Access in the Commercial and Residential Environments of US Businesses; Part One: Cable Modem Services* at 20, Table 11 (Nov. 2003) (48.5% subscribe to cable modem; 17.8% subscribe to DSL).
[16] *See generally* Comments of Verizon at 19-22, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 (FCC filed Mar. 1, 2002).
[17] Notice of Inquiry ¶ 34 & n.43, GN Docket No. 04-54 (FCC rel. Mar. 17, 2004) ("*Fourth Notice of Inquiry*").

broadband market, thus making advanced telecommunications capability available to even more Americans. Recent developments in intermodal competition are described in considerable detail in the attached *Broadband Competition Update*.[18] The following discussion gives a few highlights from that report.

a) Fixed Wireless

Recent evidence confirms that fixed wireless continues to be a viable broadband alternative for many customers, and is likely to grow significantly in the future. The Commission has estimated that residential fixed wireless Internet access is available in counties that contain approximately 62 million people, or 22 percent of the U.S. population.[19] The national trade association for fixed wireless providers has recently stated that "approximately 1,500-1,800 [Wireless Internet Service Providers] already are providing service to approximately 600,000 subscribers in the U.S., with subscribership expected to double by the end of 2003 and reach nearly 2,000,000 by the end of 2004."[20] As the Chairman of that association has noted, "[w]ireless ISPs have rolled out broadband service in virtually every state of the union – and in

[18] *See* Exh. A, *Broadband Competition Update* at 15-19.
[19] Eighth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 18 FCC Rcd 14783, A-4 at n.709 (2003).
[20] Comments of the License-Exempt Alliance at 3, *Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, ET Docket No. 03-122 (FCC filed Sept. 3, 2003) ("*LEA Comments*") (citing Alvairon, Inc., *The License-Exempt Wireless Broadband Market* at 8 (Apr. 2003)). The Commission's own *High-Speed Services Report* counts only 309,006 high-speed lines provided through "satellite or fixed wireless" as of June 2003, but this is likely due to the fact that the many fixed wireless lines are provided in rural areas by small providers. As the Commission notes, "we do not know how comprehensively small providers, many of which serve rural areas with relatively small populations, are represented in the data summarized here." Indus. Analysis Div., Wireline Comp. Bur., FCC, *High-Speed Services for Internet Access: Status as of June 30, 2003*, at 2 & Table 1 (Dec. 2003) ("*High-Speed Services Report*").

hundreds of rural and metropolitan markets. . . . Wireless has boldly become the nation's third pipe for last-mile access."[21]

The technology for and economics of fixed wireless service have improved considerably in recent years. One major development is the adoption of an industry-wide standard for fixed wireless broadband – IEEE 802.16a (commonly known as WiMax). This new standard enables fixed wireless to be used for high-speed data transmission over much greater distances than previous standards. It also "allows users to get broadband connectivity without needing direct line of sight with the base station," a major limitation of previous generations of fixed-wireless technology.[22] The adoption of a common standard and the fact that the technology is maturing have caused the costs of deploying fixed wireless to drop.[23] It is now estimated that these advances could make "last-mile WiMAX connections cheaper than cable and DSL solutions."[24]

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[21] *WISPs Buck Investment Trends*, ISP-Planet (Nov. 12, 2002), available at http://www.isp-planet.com/research/2002/vc_trends_021112.html.

[22] WIMAX Forum, *WIMAX Overview* at 2, *available at* http://www.wimaxforum.org; *see also Strategy Analytics: Fixed Wireless Broadband Heads Home*, M2 Presswire (Nov. 19, 2003) ("Advances in the underlying technology have relaxed the line-of-sight constraints that used to make residential installations an expensive and uncertain proposition.") (quoting Tom Elliott, VP, Strategy Analytics).

[23] M. Angell, *Techs Again Tout Fixed Wireless*, Investor's Business Daily at A06 (May 7, 2003); *see also* D. Molta, *[News Without the Noise] – 802.16a: Sedan or Mack Truck?* Network Computing (Aug. 7, 2003) ("As IEEE standardizes on a metropolitan wireless MAC interface and WiMax pushes the OFDM physical-layer interface, it's predictable that the cost of base-station equipment and subscriber modems will come down."); *Fixed Wireless as Residential Access Sees Renewed Life*, Electronic News (Nov. 24, 2003) ("Reduced equipment costs, improved performance, and an aggressive set of vendors and wireless ISPs are making fixed wireless a serious broadband contender in rural towns and urban fringes.") (quoting Tom Elliott, VP, Strategy Analytics).

[24] M. Hogan, *To the WiMAX: A New Protocol Spices Up the 802.X Alphabet Soup*, Entrepreneur (Dec. 1, 2003) (citing Intel marketing manager Margaret LaBrecque); *see also* M. Stone & D. Chang, *Great Expectations for WiMAX*, Wireless Data News (Dec. 17, 2003) ("WiMAX infrastructure likely will be less expensive than existing infrastructure, and the lower entry costs will encourage new market entrants.").

b) Broadband over Power Lines

Recent evidence confirms the near-term promise of Broadband over Power Lines ("BPL") as a viable broadband alternative. Commercial BPL rollouts are currently underway in Manassas, Virginia, and Cincinnati, Ohio, and BPL trials have been conducted in at least eight states.[25] BPL can be used to provide high-speed access at speeds comparable to or faster than DSL and cable modem, and at comparable or lower prices.[26]

Perhaps most important, for purposes of the present inquiry, is that the power lines used to deliver this new broadband technology have *already* been deployed to virtually every home and business in the nation. In the Commission's own words, "[s]ince Access BPL uses the same power lines that carry electricity virtually everywhere, much of the infrastructure needed to operate this technology is already in place, so that major savings in deployment costs and capital may be realized in its deployment."[27] The Commission has proposed changes to Part 15 of its Rules in order to facilitate the deployment of BPL technology.[28] The Power Line Communications Association estimates that "broadband over power line will reach between 750,000 and 1 million customers by the end of 2004."[29] Independent industry analysts estimate

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[25] *See* Exh. A., *Broadband Competition Update* at 19 & n.89.
[26] Comments of Cinergy Corp. at 1-2, *Inquiry Regarding Carrier Current Systems, Including Broadband Over Power Line Systems*, ET Docket No. 03-104 (FCC filed July 7, 2003) (claiming that "[h]igh-speed Internet access in the trials achieve[d] speeds over 2 megabits/second"); Prospect Street Broadband, *Products and Services*, http://www.prospectstreet.com/psb/Products/ResidentialServices.htm (offering residential high-speed Internet access for only $26.95 per month).
[27] Notice of Proposed Rule Making ¶ 30, *Carrier Current Systems, including Broadband over Power Line Systems; Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems*, ET Docket Nos. 03-104 & 04-37 (FCC rel. Feb. 23, 2004) ("*BPL NPRM*").
[28] *See generally BPL NPRM.*
[29] W. Rodgers, *Power To Interfere?*, Tampa Tribune, MoneySense at 10 (Jan. 5, 2004).

that "BPL will encompass six million power lines by 2006, promising revenues of $3.5 billion."[30]

c) Satellite

Broadband delivered via satellite may be particularly attractive to customers located in rural areas, where the costs of deploying new wireline or cable facilities are high. One of the two main broadband satellite providers – Hughes Network Systems – reported 177,000 customers for its DIRECWAY service as of the third quarter of 2003.[31] In October 2003, MCI began reselling Hughes's DIRECWAY service to "small-to-medium businesses and enterprises."[32] Hughes was recently taken over by News Corp., which pledged to "work aggressively to ensure that broadband services are available to as many American consumers as possible."[33] The other main satellite provider – StarBand – emerged from bankruptcy in November 2003 with most of its customer base intact.[34] The company has recently introduced new hardware and service offerings targeted at mass-market customers, with lower prices and higher speeds that were previously available.[35] Finally, WildBlue Communications plans to introduce broadband

[30] *At CompTel Fall 2003: What's The Next Big Thing*, Comm. Today (Oct. 13, 2003) (citing Gartner Group research).
[31] Hughes Electronics Corp., Form 10-Q, at 38 (SEC filed Nov. 7, 2003) (residential and small office/home-office customers in North America).
[32] MCI, *Enterprise, Internet Broadband Satellite*, available at http://global.mci.com/us/enterprise/internet/ broadbandsat/.
[33] Consolidated Application for Authority to Transfer Control at 31, *Application of General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee*, MB Docket No. 03-124 (FCC filed May 15, 2003).
[34] *Starband to Emerge from Bankruptcy Protection by Month's End*, Satellite Week (Nov. 24, 2003) ("Starband is expected to emerge from bankruptcy protection late this month with a revamped sales staff. . . . Starband has 38,000 subscribers, having lost 2,000 since filing for bankruptcy protection in U.S. Dist. Court, Wilmington, Del., in May 2002.").
[35] *See, e.g.*, *StarBand Unveils Faster Modem*, Satellite News (Aug. 4, 2003); *Starband to Emerge from Bankruptcy Protection by Month's End*, Satellite Week (Nov. 24, 2003).

satellite service in the Ka-band during 2004.[36] The National Rural Telecommunications Cooperative (NRTC) has agreed to a distribution partnership with WildBlue.[37] The NRTC is "confident that WildBlue is the best solution to deliver affordable high-speed satellite Internet access to rural America," and that "virtually every home and small business in the continental United States will finally have access to the most advanced telecommunications services available."[38]

d) 3G Mobile Wireless

In recent months, third-generation ("3G") wireless services have taken another step closer to becoming a full-fledged competitor in the broadband market. In September 2003, Verizon Wireless launched a 3G wireless network in Washington, D.C., and San Diego.[39] Verizon's 3G service using EvDO technology provides Internet access at speeds of 300-500 kbps, with bursts up to 2 Mbps,[40] making the download speeds comparable to those of DSL and cable modems. In January 2004, Verizon announced that it will spend over $1 billion deploying its EvDO network over the next two years, allowing it to reach many major metropolitan areas across the country.[41] Other wireless carriers are poised to follow Verizon's lead in this area.[42]

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[36] WildBlue Communications Press Release, *NRTC to Offer WildBlue Satellite Broadband Services* (Aug. 25, 2003), available at http://www.wildblue.com/press/2003/082503.asp.
[37] *Id.*
[38] *Id.* (quoting NRTC President and CEO Bob Phillips).
[39] Verizon Wireless Press Release, *Wireless Broadband Data Service Introduced in Major Metro Areas* (Sept. 29, 2003), available at http://news.vzw.com/lead_story/pr2003-09-20.html.
[40] Verizon Wireless Press Release, *Verizon Wireless Announces Roll Out of National 3G Network* (Jan. 8, 2004), available at http://new.vzw.com/news/2004/01/pr2004-01-07.html.
[41] *Id.*
[42] *See* Exh. A, *Broadband Competition Update* at 23-24.

All these recent developments confirm that, as the Commission has repeatedly found, competition is flourishing in the broadband market, and that the preconditions for monopoly appear absent.[43]

B. Next-Generation Broadband Is Still in Its Infancy But Promises Extraordinary Benefits

Verizon has long maintained that, "[a]lthough DSL provides a competitive way for telephone companies to enter the broadband business, it is not an end-state technology."[44] Accordingly, Verizon has moved ahead aggressively with plans to roll out the second generation

[43] *See, e.g.*, Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, 2423, ¶ 48 (1999) ("*First Advanced Services Report*") ("The preconditions for monopoly appear absent . . . . [W]e see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio"); Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 17 FCC Rcd 2844, 2877-81, ¶¶ 79-88 (2002) (describing development of intermodal competition in broadband market); Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22748, ¶ 5 (2001) ("[T]he one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."); Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, 11864-65, ¶¶ 17, 19 (2000) (noting with approval "a continuing increase in consumer broadband choices within and among the various delivery technologies," which indicates that "no group of firms or technology will likely be able to dominate the provision of broadband services"); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9866, ¶ 116 (2000) (finding that cable operators, despite having a commanding share of the broadband market, face "significant actual and potential competition from . . . alternative broadband providers").

[44] Comments of Verizon at 7, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 (FCC filed Mar. 1, 2002).

of broadband networks. Specifically, Verizon has accelerated its fiber-to-the-premises ("FTTP") deployment, with the goal of passing one million homes by the end of 2004.[45]

This FTTP deployment will create a new network, overlaying the existing circuit-switched feeder and distribution network over an entire central office serving area. The FTTP network will be capable of transmitting up to 622 megabits of data per second and receiving 155 megabits of data per second (shared by the customers on each fiber), in addition to a separate path on the same fiber for video.[46] Although the parameters of the new service offerings have not yet been set, Verizon is contemplating offering a service that would provide FTTP customers with speeds that are ten to twenty times faster than current DSL or cable modem offerings. In addition to the greater speeds and innovative services it will make possible, FTTP is also more reliable than copper-based technologies and, once installed, less expensive to maintain.

Despite its indisputable benefits, however, deployment of FTTP in the U.S. has barely begun. At present, only approximately 180,000 homes are passed by such fiber facilities, and only approximately 65,000 of those homes subscribe to fiber services. Widespread deployment of FTTP will entail massive upfront investment and risk. As discussed below, in order to assure the deployment of this next generation of broadband infrastructure and services to all Americans in a reasonable and timely fashion, the Commission should act quickly to clarify its rules regarding the unbundling obligations that will apply to the new FTTP network.

[45] *See* Exh. B, Holland Decl. ¶ 11.
[46] *See id.* ¶ 8.

II. The Commission Should Clarify the Unbundling Rules for Next-Generation Broadband Announced in the *Triennial Review Order*, in Order to Maximize the Pro-Deployment Effect of These New Rules

As President Bush recently said, "a proper role for the government is to clear regulatory hurdles [to broadband deployment] so those who are going to make investments do so."[47] The Commission took an important first step toward clearing those regulatory hurdles by deciding in its *Triennial Review Order*[48] not to require unbundling of next-generation broadband facilities used to serve mass-market customers. The Commission correctly found that "removing incumbent LEC unbundling obligations on [fiber-to-the-premises] loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market."[49] As the Commission put it, "with the certainty that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market."[50] Likewise, "with the knowledge that incumbent LEC next-generation networks will not be available on an unbundled basis," competing providers also will have strong new incentives to pursue innovative alternatives.[51] "The end result is that consumers will benefit from this race to build next

[47] Remarks of President George W. Bush at the American Association of Community Colleges Annual Convention, Minneapolis, Minnesota (April 26, 2004), available at http://www.whitehouse.gov/ news/releases/2004/04/20040426-6.html ("President's April 26 Remarks").
[48] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").
[49] *Triennial Review Order*, 18 FCC Rcd at 17145, ¶ 278.
[50] *Id.* at 17141,¶ 272.
[51] *Id.*

generation networks and the increased competition in the delivery of broadband services."[52] The D.C. Circuit specifically approved this rationale on appeal.[53]

Unfortunately, the rules adopted in the *Triennial Review Order* do not provide the intended certainty that Verizon and other incumbent telephone companies will be able to benefit from their broadband investments. To the extent that the Commission is concerned with the U.S.'s status as a leader internationally in development and deployment of broadband,[54] the key to improving this country's position vis-à-vis other nations is investment in *next generation* networks. Therefore, clarifying the unbundling rules announced in the *Triennial Review Order* should have particularly high priority. Three areas are of particular concern. The Commission should:

- forbear from applying any unbundling requirements for broadband network elements that section 271 might be construed to impose;
- clarify the cutoff between mass market and enterprise market for purposes of rules governing unbundling of fiber loops; and
- clarify that fiber to a multi-unit premises counts as fiber to the home for purposes of the Commission's unbundling rules, regardless of whether the fiber extends all the way to each unit in the premises.

A. The Commission Should Forbear from Applying to Broadband Any Separate Unbundling Requirements That Section 271 Might Ultimately Be Interpreted to Impose

In the *Triennial Review Order*, the Commission determined that competitors were not impaired without access to next-generation broadband network elements. In reaching this decision, the Commission specifically took note of the robust intermodal competition in the

[52] *Id.*
[53] *See USTA II*, 359 F.3d at 584.
[54] *See Fourth Notice of Inquiry* ¶¶ 43-44.

broadband mass market.[55] The Commission also found that, in addition to being unnecessary, forced unbundling would have a harmful effect on incentives to invest and to compete, for incumbent local telephone companies and their competitors alike.[56] On appeal, the D.C. Circuit upheld the Commission's decision that not imposing an unbundling obligation for broadband network elements was in the best interest of competition and consumers, "in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband."[57]

All of this is just as true for unbundling pursuant to section 271 as it is for unbundling pursuant to section 251. Indeed, to require unbundling of network elements under section 271 would eviscerate the Commission's findings and conclusion that such unbundling would be not only unnecessary but harmful to competition and to consumers. The Commission should forbear from enforcing any unbundling requirements that section 271 might be interpreted to impose on broadband. Verizon has a petition for forbearance on this topic pending before the Commission and urges the Commission to grant the petition promptly.

B. The Commission Should Adopt a Bright-Line Rule Distinguishing the Broadband Mass Market from the Broadband Enterprise Market for Purposes of the Commission's Unbundling Requirements

The *Triennial Review Order* provides that fiber-to-the-premises loops generally do not have to be unbundled for mass-market customers but imposes greater unbundling obligations on

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[55] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17136, ¶ 263 ("the fact that broadband service is actually available through another network platform [*i.e.*, cable modem] and may potentially be available through additional platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon" unbundled access to the broadband capabilities of local telephone company networks).

[56] *See, e.g.*, *id.* at 17149, ¶ 288 (finding that unbundling obligations "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities.").

[57] *USTA II*, 359 F.3d at 585.

loops serving enterprise customers. Yet the Commission has not clearly stated which customers are included in the mass market and which are in the enterprise market for purposes of these new rules. Consequently, Verizon and other incumbent local telephone companies do not know which customers they can serve without becoming subject to unbundling requirements. The Commission should adopt a uniform, national definition of the mass market in order to alleviate the current uncertainty about the distinction between the mass market and the enterprise market and also to help create incentives to deploy fiber rapidly to small and medium-sized businesses as part of the generalized roll-out of fiber in neighborhoods throughout the country.

The Commission has indicated that its analysis of enterprise-market loops differs from its analysis of mass-market loops because enterprise customers are likely to justify their own individualized deployment, while mass-market customers are likely to be served as part of a generalized build-out in a particular neighborhood or area.[58] From this it follows that, in order to be sure that the small and medium-sized businesses that play such a vital role in our nation's economy are among the customers who benefit from increased broadband competition and the race to build next-generation networks, the Commission must take care to draw the line between the mass and enterprise markets in such a way that these businesses are included in the mass market, because they can be served economically only as part of a generalized deployment.

[58] *See Triennial Review Order*, 18 FCC Rcd at 17163, ¶ 309 ("In the enterprise market, companies are able to target individual buildings and customers and determine which technology is the optimal means of reaching each customer," while "in the mass market where revenues are small, customers are typically served in large groups, using uniform technologies and mass marketing and provisioning techniques to minimize the cost of serving each customer.").

One simple way for the Commission to do so is to define the mass market to include any customer with 48 or fewer telephone numbers.[59] This cut off will help ensure that the real estate agents, medical and legal offices, dry cleaners, and other small and medium-sized businesses that cable companies have been competing to serve most aggressively will be included in the mass market.[60] Using telephone numbers as the criterion clearly distinguishes these businesses from larger enterprise business customers, which have more sophisticated requirements and, in general, already have access to high-speed connectivity because it makes economic sense for carriers to deploy fiber especially to serve them. Putting small and medium-sized businesses squarely in the mass market is desirable not only because these customers arguably stand to benefit the most from fiber-to-the-premises deployment but also because overall efficiency in the deployment of next-generation networks will increase if carriers have incentives to cover *entire* neighborhoods with the new technology, including the local law firms, physicians, accountants, realtors, specialty retail stores, car dealerships, restaurants, service professions (electricians, plumbers, etc.), and other small and medium-sized businesses interspersed throughout those neighborhoods.

Carriers have economic reasons for rolling out new fiber networks first to customer locations where those networks are not subject to mandatory unbundling. To build and operate a network that can be unbundled, even where no unbundling is required, would be extremely

[59] Using the number of telephone lines currently used by a customer provides a more stable and workable dividing line between markets than a line based directly on capacity or technology. After fiber is in place, a single home taking advantage of next-generation services might well need more than a DS-1's-worth of capacity, and the definition of the mass market should include some growing room for customers who experience this kind of increased need for bandwidth. Moreover, given the rapid evolution of broadband technologies, any attempt to create a market definition based on the technologies used by different customers would likely require the Commission to constantly re-visit the definition and to entertain frequent waivers.

[60] *See generally In-Stat/MDR Small Business Study*.

expensive and inefficient. As a result, if significant portions of a given neighborhood are subject to unbundling (or if carriers are uncertain as to whether these portions are subject to unbundling), then carriers have an incentive not to deploy to that neighborhood (or those portions of the neighborhood) in the first instance – and this in turn reduces carriers' ability to spread costs and earn revenues over the largest possible customer base. Allowing carriers to adopt uniform practices and network design throughout their service areas – and to roll out fiber loops secure in the knowledge that they need not be handed over to competitors on demand – will avoid creating disincentives to deployment of next-generation networks. The importance of avoiding such disincentives does not differ from locality to locality. Accordingly, the Commission should create a national, bright-line distinction between the mass market and the enterprise market, so that all providers know where unbundling of fiber loops is required.

C. The Commission Should Clarify That Mass-Market Customers in Multi-Unit Premises Are Part of the Mass Market, Regardless of Whether Fiber Extends to Each Unit in the Premises

Although the *Triennial Review Order* states that the loop "unbundling obligations and limitations for such loops *do not vary based on the customer to be served*,"[61] a footnote in the order appears to equate mass-market customers that "reside in multiunit premises" with "multiunit premise-based enterprise customers."[62] Because enterprise customers are subject to greater unbundling obligations than mass-market customers, this footnote suggests that fiber deployed to the significant segment of the mass market that reside in multi-unit premises may be subject to greater unbundling obligations than apply to other segments of the mass market.

[61] *Triennial Review Order*, 18 FCC Rcd at 17110, ¶ 210 (emphasis added).
[62] *Id.* at 17102, ¶ 197 n.624.

The Commission should take two steps to resolve the ambiguity in the *Triennial Review Order*. *First*, it should make clear that mass-market customers, including small and medium-sized businesses, in multi-unit premises are part of the mass market, rather than part of the enterprise market. *Second*, it should clarify that its definition of fiber to the premises applies to any situation where fiber is deployed to a multi-unit building, regardless of whether the fiber continues to the individual units within that building. These clarifications are necessary to fulfill the Commission's goal to "promote investment in, and deployment of, next-generation networks" to as broad a geographic base of customers as possible.[63]

Subjecting multi-unit premises, but not single-unit premises, to broadband unbundling also makes no sense as an economic matter – especially when the cable companies, which already dominate the broadband mass market, and which have strong economic incentives to focus on multi-unit premises, are subject to no comparable unbundling requirement. It is more economical for competitors to deploy fiber to mass-market customers in multi-unit premises, where customers are highly concentrated, than to deploy fiber to customers that are more dispersed. The Commission has recognized that competitive carriers "usually" target "multiunit premises" precisely because such premises have an aggregated base of customers that provide "sufficient demand . . . to generate a revenue stream that could recover the sunk construction costs of the underlying loop transmission facility."[64] This holds true not only for residential customers but also for the small and medium-sized business customers who (as discussed above) are part of the mass market as well.

[63] *Id.* at 17141, ¶ 272.
[64] *Triennial Review Order*, 18 FCC Rcd at 17160, ¶ 303.

Once the Commission clarifies that no unbundling is required for fiber deployed to multi-unit premises generally, it should additionally clarify that this holds true in any situation where fiber is deployed to a multi-unit premises building, regardless of whether the fiber continues to the individual units within that building. Fiber to the building *is* fiber to the premises and ought to be regulated as such.

III. The Commission Should End the Disparate Regulatory Treatment of Broadband Provided by Telephone Companies

The Commission has cited with apparent approval statements by cable companies that their continued deployment of cable modem service could be delayed or even halted if they were subjected to common-carrier regulations.[65] The much more onerous unbundling, pricing, tariffing, accounting, and reporting requirements faced by local telephone companies in their provision of broadband have a correspondingly greater potential to affect incentives to invest. Given the vibrant and increasing intermodal competition that characterizes the mass-market broadband today, continued imposition of dominant-carrier regulation on telephone companies in their provision of broadband is not only unnecessary but counterproductive. The Commission should therefore declare local telephone companies to be non-dominant in their provision of broadband and should lift the regulations that tend to inhibit the major investments needed to increase broadband deployment. To do so is fully consistent with Congress's instruction, in Section 706, to use "regulatory forbearance" to "remove barriers to infrastructure investment" in broadband.

[65] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4826, ¶ 47 & n.176 (2002) ("*Cable Modem Declaratory Ruling*").

A. Federal Law Requires That the Commission Stop Treating Telephone-Company Broadband Less Favorably Than Other Broadband

The Commission has tentatively concluded that, to the extent that Title II applies to cable modem service at all, forbearance from all Title II regulation of cable modem service would be appropriate. The Commission explained that "forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing."[66] These same considerations apply equally to local telephone company broadband – indeed, more so, because local telephone companies serve a smaller share of the broadband mass-market segment than cable companies. In the presence of robust, facilities-based competition, reliance on market forces to set the terms and conditions of service is in the public interest, while heavy-handed, asymmetric common-carrier regulation would actually harm competition and consumers. For confirmation of this principle, one need look no further than the Commission's own *Computer II* decision, which recognized that "the very presence of Title II requirements inhibits a truly competitive, consumer responsive market." [67]

The Commission's continued disparate regulation of wireline and cable broadband would violate numerous provisions of federal law. *First*, Section 706 of the 1996 Act mandates that the Commission regulate broadband "without regard to any transmission media or technology."[68] To apply a different regulatory classification to broadband transmission based on the technology used, or to remove barriers to investment for some technologies but not for others, would flatly contradict this mandate. In addition, the Act's definition of a telecommunications service, which

[66] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4847-48, ¶ 95.
[67] *See* Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 F.C.C.2d 384, 426, ¶ 109 (1980).
[68] 47 U.S.C. § 157 note.

has been linked by the Commission and the courts to common-carrier regulation, makes clear that a service is included – or excluded – as a telecommunications service "regardless of the facilities used."[69] Thus, if cable modem service is free from Title II regulation, then competing services that have smaller market shares must be free from it as well.

Second, serious First Amendment concerns are raised by the one-sided burdens and restrictions that the present regulatory regime places on the deployment and use of local telephone companies' broadband services and facilities. Broadband transmission services are one medium through which telephone companies, like their cable and satellite competitors, deliver broadband content services to their customers. Broadband, in other words, is the microphone through which telephone companies speak, and regulations that inhibit deployment or use of broadband necessarily impinge on their ability to speak. Accordingly, if the Commission were to refrain from common-carrier regulation of cable modem service while maintaining common-carrier regulation of local telephone company broadband, both the Commission's reason for continued regulation *and* its reason for distinguishing between cable operators and local telephone companies would be subject to "intermediate scrutiny."[70] A

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[69] *Id.* § 153(46).

[70] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) (applying intermediate scrutiny to FCC's cable must-carry regulations and warning that "the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media") (citations omitted); *BellSouth Corp. v. FCC*, 144 F.3d 58, 68 (D.C. Cir. 1998) (applying intermediate scrutiny to restrictions on speech that apply exclusively to RBOCs), *cert. denied*, 526 U.S. 1086 (1999); *cf. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (both holding that selective taxation of the press warranted heightened, even strict, scrutiny). Under intermediate scrutiny, a regulation will withstand judicial review only "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *BellSouth Corp.*, 144 F.3d at 69-70 (citation and internal quotation marks omitted).

decision by the Commission maintaining Title II obligations on local telephone companies could not pass this exacting standard.

Third, the Administrative Procedure Act and the equal protection component of the Fifth Amendment's Due Process Clause prohibit the Commission from "improperly discriminat[ing] between similarly situated . . . services without a rational basis."[71] Cable modem and DSL services are functionally indistinguishable, and cable modem operators control about two thirds of the broadband mass market.[72] The Commission therefore cannot rationally conclude that local telephone companies pose a greater risk to competition in broadband than cable operators. For the Commission to retain common-carrier regulations for local telephone companies in their provision of broadband would, given their lack of market power, lack any rational basis.

B. The Commission Should Reach the Same Conclusions with Respect to Telephone-Company Broadband as It Did with Respect to Cable-Company Broadband in Its *Cable Modem Declaratory Ruling*

In its *Cable Modem Declaratory Ruling*, the Commission made three separate conclusions:

1. Cable companies are free to provide broadband transmission service to ISPs or other content providers on a private carriage basis under Title I.
2. The *Computer II/III* rules were waived, and the Commission tentatively concluded that it should forbear from applying Title II requirements to the extent that courts should find them otherwise applicable.[73]
3. Cable modem service offered to end users constitutes an information service and not a telecommunications service.

Consequently, in order to treat broadband provided by telephone companies in the same way as it treats cable modem service, the Commission should declare the following:

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[71] *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 740 (D.C. Cir. 1997).
[72] *See, e.g.*, *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4803, ¶ 9 ("approximately 68% of residential broadband subscribers today use cable modem service") (footnote omitted).
[73] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825-26, ¶¶ 45-47 (waiving *Computer II* requirements to the extent they apply to providers of cable modem service); *id*. at 4848, ¶ 95 (seeking comment on Commission's tentative conclusion that "forbearance from the requirements of Title II and common carrier regulation is appropriate in this circumstance").

1. Telephone companies are free to provide broadband transmission service to ISPs or other content providers on a private carriage basis under Title I.
2. The *Computer II/III* rules are waived, and the Commission forbears from applying Title II requirements to the extent that they are applicable.
3. Broadband Internet access offered to end users constitutes an information service and not a telecommunications service.

Each of these three key conclusions supports the goal of encouraging broadband deployment.

1. The Commission Should Declare That Telephone Companies May Provide Broadband Transmission Service on a Private-Carriage Basis Under Title I

In its *Cable Modem Declaratory Ruling*, the Commission found that cable modem service involved an offering from the cable company to the end user: "Even where an unaffiliated ISP provides most of the information service functions . . . the entity that ultimately provides cable modem service to the subscriber is the cable operator."[74] The Commission noted that this fully integrated business model might be changing, and recognized that it was "possible, however, that when EarthLink or other unaffiliated ISPs offer service to cable modem subscribers, they receive from AOL Time Warner an 'input' that is a stand-alone transmission service, making the ISP an end-user of 'telecommunications,' as that term is defined in the Act."[75] The Commission noted that deals between cable companies and ISPs are negotiated individually and thus constitute a private carriage, rather than common carriage. The Commission therefore concluded that even if "telecommunications" was being offered to ISPs, no common-carrier "telecommunications service" was being offered.[76]

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[74] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4828, ¶ 51.
[75] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4829-30, ¶ 54.
[76] In the Commission's words:

> The record indicates that AOL Time Warner is determining on an individual basis whether to deal with particular ISPs and is in each case deciding the terms on which it will deal with any particular ISP. To the extent that AOL Time Warner is making an offering of pure telecommunications to ISPs, it is dealing with each ISP on an

The Ninth Circuit's decision in *Brand X Internet Servs. v. FCC*,[77] expressly left intact the Commission's conclusion that cable companies may offer broadband service at wholesale to ISPs on a private carriage (as opposed to common carriage) basis.[78] As a result, the sale of transmission by cable companies to ISPs is subject to regulation, if at all, only under Title I (*not* because it is an information service but because it is telecommunications that is being offered on a non-common-carrier basis). Therefore, in order to level the regulatory playing field, the Commission should declare that telephone companies may also provide broadband transmission on a private carriage basis.

A declaration of this type would create no inconsistency with the Ninth Circuit's prior decision in *AT&T Corp. v. City of Portland*[79] (on which the *Brand X* decision was based) because the court in that case considered the regulatory status of service offered to end users under the fully integrated business model then prevalent among cable operators. The way DSL service is offered (and perhaps cable modem service nowadays, too, to the extent that multiple ISPs have access to the cable plant) is quite different: ISPs offer integrated information services to their end users using telecommunications obtained from telephone companies as an input. Verizon's telephone companies, for example, sell transmission to Verizon's Internet service

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> individualized basis and is not offering any transmission service indiscriminately to all ISPs. Thus, such an offering would be a private carrier service, not a "telecommunications service." Similarly, to the extent that other cable providers elect to provide pure telecommunications to selected clients with whom they deal on an individualized basis, we would expect their offerings to be private carrier service.

Cable Modem Declaratory Ruling, 17 FCC Rcd at 4830-31, ¶ 55 (footnotes and citations omitted).

[77] 345 F.3d 1120 (9th Cir. 2003).

[78] *Id.* at 1132 n.14 ("[W]e decline here to consider their remaining claims (including those directed at the validity of the FCC's determination that AOL Time Warner offers cable transmission to unaffiliated ISPs on a private carriage basis . . .), leaving them for reconsideration by the FCC on remand.").

[79] 216 F.3d 871 (9th Cir. 2000).

affiliate and to other ISPs, who may also purchase transmission from other broadband providers, such as cable companies. Those ISPs (rather than the Verizon telephone companies) are the entities that have the relationship with the broadband customers, and they use the transmission obtained from Verizon as an input into their information service offering. Under these circumstances, customers have various options for accessing broadband Internet service, and ISPs have various options for reaching their broadband customers.

To sum up, although the *City of Portland* panel classified the underlying telecommunications as a common-carrier telecommunications service when the only way for customers to get the telecommunications was directly from the cable company which controlled the last mile, it is not necessary to classify the telecommunications that way when (a) customers have multiple, competitive avenues for purchasing the telecommunications and (b) the telecommunications are not being offered on a common-carrier basis to the public at large but are the subject of private contracts with the various ISPs. Accordingly, the Commission should clarify that broadband services, including stand-alone broadband transmission, may be offered on a non-common-carrier basis and therefore outside of Title II.

By putting an end, at long last, to the disparate regulatory burdens imposed on telephone companies in their provision of broadband, the Commission will allow healthy intermodal competition to drive broadband deployment to all Americans.

2. The Commission Should Waive or Forbear from Its *Computer II/III* Rules and Should Forbear from Title II Regulation of Broadband

Brand X did not limit the Commission's authority to deregulate broadband for cable companies and telephone companies alike. Indeed, the *Brand X* court expressly declined to

address the Commission's decision to waive the *Computer II* rules.[80] Similarly, in *City of Portland*, the Ninth Circuit took pains to "note that the FCC has broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest. *See* 47 U.S.C. § 160(a)."[81] "Congress has reposed the details of telecommunications policy in the FCC," the court explained, "and we will not impinge on its authority over these matters."[82]

Accordingly, the Commission *today* can and should forbear from applying Title II common-carrier regulations and should waive the *Computer II/III* requirements in the broadband context for substantially the reasons given in the *Cable Modem Declaratory Ruling*: the emergence of intermodal competition shows that we are no longer operating in a one-wire world, so there is no need to force telephone companies to offer the transmission component of every broadband service on a stand-alone basis under tariff.[83]

Similarly, the Commission's ability to forbear from common-carrier Title II regulation of broadband was not implicated by *Brand X*. Removing applicable common-carrier regulations would be a positive step to narrowing the regulatory disparities in the treatment of broadband provided by telephone companies, on the one hand, and by their intermodal competitors, on the other. Specifically, the Commission should eliminate the requirement that carriers must file tariffs. The Commission should also forbear from any requirement under Section 201 that rates

[80] *Brand X*, 345 F.3d at 1132 n.14.
[81] *City of Portland*, 216 F.3d at 879.
[82] *Id.* at 879-80.
[83] In the Commisison's own words, "the core assumption underlying the *Computer Inquiries* was that the *telephone network* is the primary, if not exclusive, means through which information service providers can gain access to their customers." *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825, ¶ 44 (citing *Wireline Broadband NPRM* ¶ 36).

for broadband services be justified in terms of the cost of providing service. The Commission should make clear that market-based rates are by definition just and reasonable and should allow local telephone companies the freedom to experiment with non-traditional pricing methods (such as revenue sharing or pricing based on the number of clicks or "eyeballs" delivered to customers) that are already being used by cable modem companies and on the Internet.

The present market situation in broadband clearly meets the forbearance standards that the Commission has previously established. Competition is robust in this market, and there is nothing to suggest that a local telephone company with its share of the market could charge unjust or unreasonable prices or engage in unjust or unreasonable practices. Indeed, as noted in Part I above, DSL prices have fallen substantially in the past year, prompting Cable operators to respond with promotional price reductions of their own and by increasing data speeds that effectively offer consumers more bandwidth at a lower price.

The imposition of Title II regulation on one class of competitors while leaving the rest free of regulation is contrary to the public interest because it skews, rather than promotes, competition. In addition, regulation adds costs to local telephone company provision of broadband services, and the avoidance of unnecessary cost is also in the public interest. Under these circumstances, Section 10 – not to mention Section 11 (of the 1934 Act) and Section 706 (of the 1996 Act) – requires that the Commission forbear.

3. The Commission Should Declare That Broadband Offered to End Users Is an Information Service and Not a Telecommunications Service

In *Brand X*, the Ninth Circuit reviewed the Commission's *Cable Modem Declaratory Ruling* and held that cable modem service provided to end users includes a telecommunications service. Significantly, however, the court did not even consider the Commission's statutory

interpretation; instead, it held that the question of the proper classification for cable modem service was foreclosed by the court's own prior decision in *City of Portland.* Equally significant, the court's *Brand X* decision is not yet final; the court has stayed its mandate pending the disposition of petitions for a writ of certiorari. Accordingly, the Commission's authoritative position on the proper statutory classification of cable modem service – supported by reasoning that has not yet been considered by any court – is that cable modem service offered to end users is an information service and *not* a telecommunications service, and the Commission should treat broadband provided by telephone companies the same way.

Indeed, by adopting the same statutory classification for *all* broadband services, regardless of provider, the Commission would actually improve the chances of its interpretation being upheld on appeal. The Ninth Circuit panel in *City of Portland* reached its decision in part because it lacked the benefit of this Commission's expert views on the proper statutory classification for cable modem services[84] and in part because of the manifest inconsistency in the Commission's regulatory treatment of cable modem service and DSL (which, unlike cable modem service is subject to burdensome common-carrier regulation).[85] By moving *now* to create a level playing field for all broadband providers (including telephone companies), the

[84] *City of Portland*, 216 F.3d at 876 ("We note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us.").

[85] In *City of Portland* the court noted that "[i]n the Telecommunications Act, Congress defined advanced telecommunications capability 'without regard to any transmission media or technology,' in terms that describe cable broadband." 216 F.3d at 879 (quoting § 706 of the 1996 Act, 47 U.S.C. § 157 note). The court also recognized that DSL is "a high-speed competitor to cable broadband" that the FCC regulates "as an advanced telecommunications service subject to common carrier obligations." *Id.* The regulatory classification of DSL plainly influenced the court's determination that cable modem service likewise should be classified, at least in part, as a telecommunications service: "Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, 'regardless of the facilities used.' 47 U.S.C. § 153(46)." *Id.*

Commission would not only eliminate the inconsistency that animated the *City of Portland* court's reasoning but also would unleash an additional, significant argument in favor of its statutory interpretation. If all broadband providers were free from common-carrier regulation then the Commission could argue persuasively that the competitive development of the broadband marketplace makes common-carrier regulation of the dominant cable-company players unnecessary – an argument that cannot be taken seriously so long as the Commission continues to impose common-carrier regulation on the telephone companies that are minority players in the broadband marketplace.

IV. The FCC Should Pre-Empt State and Local Regulation of Broadband

As it moves forward in removing regulatory disincentives to broadband deployment at the federal level, the Commission also should pre-empt state and local attempts to regulate broadband services. Otherwise, broadband providers will be subject to a patchwork of regulations that would make expanding services more difficult, thus impeding the development of broadband services and undermining the Commission's efforts to create a minimal regulatory environment for broadband.

A. The Commission Should Pre-empt State and Local Efforts to Regulate Broadband Network Deployment and Services

The Commission should pre-empt states or local units of government from regulating broadband services either directly or indirectly. By way of direct regulation, some state or local authorities have threatened to regulate service quality or even to require carriers to obtain a local franchise in order to provide broadband service. As for indirect regulation, the Commission should pre-empt any state or local efforts to regulate broadband by imputing revenues from broadband to other regulated services (effectively denying or severely limiting broadband

providers from profiting from their risky investments in new broadband services or facilities), or allocating costs from regulated services to broadband services (effectively driving up the price of broadband to the detriment of consumers and of competition). Either direct or indirect regulation would depress incentives for investment, deployment, and innovation in broadband, in contravention of federal policy. Nor is this a merely hypothetical problem. California regulators, for example, have determined that the high frequency portion of the loop must be offered on an unbundled basis, despite this Commission's determination to the contrary in the *Triennial Review Order*.[86]

The Commission has ample authority to pre-empt any state and local attempts at regulating broadband. Pre-emption of state regulation is permissible when a matter is entirely interstate, or when the intrastate aspects are inextricably intertwined with the interstate aspects so that state regulation would negate the Commission's exercise of its own lawful authority.[87] The Commission's jurisdiction over "all interstate and foreign communication by wire or radio"[88] is defined to include "all instrumentalities, facilities, apparatus, and services . . . incidental to such

[86] *See* Opinion Granting Motion To Vacate Stay In Decision 04-03-044, *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Network*, D. 04-05-022 (California P.U.C. May 6, 2004).

[87] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375-76 n.4 (1986) (FCC may pre-empt state regulation of intrastate telecommunications matters when (1) it is impossible to separate the interstate and intrastate components of the Commission's regulation, and (2) the state regulation would negate the Commission's lawful authority over interstate communication); *Public Serv. Comm'n v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (pre-emption allowed to protect a "valid federal regulatory objective"); *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994) (upholding FCC pre-emption of purely intrastate state regulations where, although compliance with federal and state regulations is technically possible, it is unlikely for operational and economic reasons).

[88] 47 U.S.C. § 152(a).

[communication]."[89] Thus, the Commission may lawfully pre-empt state regulation not only of mixed-use services themselves, but also of the facilities and ancillary services associated with them, so long as their intrastate and interstate aspects are sufficiently intertwined. As discussed below, the interstate and intrastate aspects of broadband are as a practical matter inseparable.

The *Cable Modem Declaratory Ruling* classified cable modem service as interstate, recognizing that "an examination of the location of the points among which cable modem service communications travel" reveals that the points "are often in different states and countries."[90] This is also true of broadband services provided by telephone companies. In any event, it is simply not practical to distinguish between interstate and intrastate data communications, or to subject isolated data flows to different regulatory regimes. Data services thus present a classic example of when compliance with both state and federal regulation, even if technically possible, is unlikely due to operational and economic considerations. The Ninth Circuit upheld the Commission's pre-emption of intrastate regulations of mixed-use services in similar circumstances in *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994). Because broadband is predominantly interstate, and because separately regulating the interstate and intrastate components of broadband (if it is even possible) would undermine the Commission's efforts to remove regulatory disincentives to broadband investment, pre-emption is appropriate.

B. The Commission Should Take Steps to Facilitate Access of Broadband Providers to Public Rights of Way

Another area of state and local regulation that may significantly retard the deployment of broadband facilities – particularly next-generation broadband facilities – is access to public rights of way or public lands. President Bush recently recognized that "[a] key to widespread

[89] *Id.* § 153(52).
[90] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, ¶ 59.

broadband deployment is ensuring that broadband providers have timely and cost-effective access to rights-of-way so that they can build out their networks across the Nation."[91] Currently, many state and local authorities (and even agencies of the Federal Government) impose unreasonable information collection requirements on applicants for access to public rights of way. Some of these authorities also create long delays in processing such applications, and many charge unreasonable fees that extract a tax on or rent for the use of the public right of way. Local governments have an important role in managing true rights-of-way issues – *e.g.*, managing the time, place, and manner of entry onto public property in order to minimize the disturbance to the public in the construction of broadband facilities. However, the Commission should make it clear that it will pre-empt any state or local efforts to use rights-of-way issues as an excuse to more broadly regulate broadband providers. For example, it should pre-empt any attempts to regulate rates, services, service quality, operations, financial qualifications, and other matters not directly related to the time, place, and manner of entry into public rights of way. Similarly, it should prohibit state or local entities from requiring broadband providers to enter into agreements, franchises, or licenses that purport to grant rights to the state or local authorities that are not directly related to the management of rights-of-way issues.

Pre-emption of more onerous state and local regulation is necessary order to remove regulatory obstacles to the deployment of advanced telecommunications capability, in fulfillment of the mandate Congress gave the Commission in Section 706.

[91] President George W. Bush, *Broadband Rights of Way Memorandum* (White House Press Release Apr. 26, 2004), *available at* http://whitehouse.gov/news/releases/2004/04/20040426-2.html.

V. The Commission Should Adopt An Inclusive Definition of Broadband and Should Decline to Impose More Onerous Data Collection Requirements on Broadband Providers

As the foregoing makes clear, the best thing the Commission can do to encourage the continued deployment and adoption of broadband nationwide is to reduce regulatory disincentives to broadband investment – especially those disincentives that affect telephone companies alone among broadband providers. Beyond this key policy imperative, Verizon wishes to comment briefly on two ancillary policy questions raised in the *Fourth Notice of Inquiry*.

First, Verizon has noted in other ongoing proceedings, the Commission's working definition for broadband, which requires speeds of 200 kbps in each direction,[92] may inadvertently exclude some data services provided via new technologies that may be accessible at lower speeds. The Commission should expand its definition to cover these new services in order to eliminate regulatory obstacles to the development and deployment of such new technologies. Verizon proposes the following working definition of broadband: A broadband service is *either* a service that uses a packet-switched or successor technology, *or* a service that includes the capability of transmitting information that is generally not less than 200 kbps in both directions.[93]

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[92] *First Advanced Services Report*, 14 FCC Rcd at 2406-07, ¶¶ 20, 22; *see also Fourth Notice of Inquiry*, ¶ 11.

[93] This definition does not include (1) traditional non-packet-switched data services, such as 56 kbps and 1.5 Mbps services, regardless of whether these services are provided over copper or fiber infrastructure (2) lower-speed data services that are based on circuit technology, such as ISDN, (3) x.25-based and x.75-based packet technologies, or (4) circuit switched services (such as circuit-switched voice-grade service) regardless of the technology, protocols, or speeds used for the transmission of such services.

Second, the Commission should proceed with extreme caution in imposing additional data collection burdens on broadband providers. The Commission may even wish to consider scaling back its data collection efforts in view of the increasingly competitive nature of the broadband marketplace and the increasing availability of deployment information from the private sector. Investment banks and industry analysts generate much useful data on broadband deployment on a quarterly basis, reducing the need for the Commission's own semi-annual reports. The Commission successfully cut back on reporting requirements in the long-distance market once competition took hold in that market.[94] The broadband market has reached the stage where the Commission may wish to consider doing likewise. Verizon understands that the Commission has recently launched a separate proceeding to consider the details of its data collection scheme, and Verizon looks forward to providing a more detailed response to the Commission's inquiry in that proceeding.[95]

Conclusion

Since the Commission's last inquiry pursuant to Section 706, the broadband market has undergone extraordinary developments. There is an urgent need for a uniform, national, deregulatory broadband policy that would allow all broadband providers to compete on an equal regulatory footing and subject to clear rules. Such a policy would allow market forces to drive

[94] *See, e.g.*, Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 20730, 20777, ¶ 86 (1996) ("[W]e will not require nondominant interexchange carriers to make rate and service information available to the public in any particular format, or at any particular location.").

[95] *See generally* Notice of Proposed Rulemaking and Order on Reconsideration, *Local Telephone Competition and Broadband Reporting*, WC Docket No. 01-141, CC Docket No. 99-301 (FCC rel. Apr. 16, 2004).

the deployment of advanced telecommunications capability to more Americans, sooner, than is possible under the existing, fractured regulatory regime.

Respectfully submitted,

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May 10, 2004